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Supreme Court of the United States

OCTOBER TERM, 1935.

No. 439.

RUFUS R. RAND, JR.,

Petitioner,

vs.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR THE PETITIONER.

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OPINIONS BELOW.

The opinion of the United States Board of Tax Appeals (R. 13-16) is not reported. See 30 B. T. A. 1460, 1464. The opinion of the Circuit Court of Appeals for the Eighth Circuit (R. 40-48) is not yet reported.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered August 19, 1935 (R. 48-49). The petition for a writ of certiorari was filed September 12, 1935, and was granted October 14, 1935. The jurisdiction of this Court rests on

Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED.

Whether shares of stock acquired by inheritance from an intestate who died October 31, 1925, and not sold or otherwise disposed of until May 28, 1928, may be said not to have been held for more than two years within the meaning of Section 101 (c) (8) of the Revenue Act of 1928 merely because distribution of the shares by the administrators was not effected until January 28, 1927.

STATUTES INVOLVED.

The statutes involved are set forth in the appendix, *infra*, pp. 40-42.

STATEMENT.

The facts are not in dispute. They were found by the Board (R. 13-16) as stipulated by the parties (R. 32-34).

Alonzo T. Rand, a resident of Minnesota (R. 40), died intestate October 31, 1925. At his death he was the owner of 4,813 1/3 shares of the common capital stock of the Minneapolis Gas Light Company. Petitioner, Rufus R. Rand, Jr., was one of the heirs,[1] and on January 28, 1927, pursuant to a decree of distribution, 962 2/3 of the shares were distributed to him. The fair market value of petitioner's shares at that time was $176 each, a total of $169,419.33 (R. 14).

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[1] The case of another heir is pending before this Court on certiorari to the Second Circuit. Kate A. Ogle vs. Commissioner, October Term, 1935, No. 137. The facts are substantially the same, and the question presented is identical. The cases of two other heirs, Elizabeth Rand Anderson and Mary Rand Stone (since deceased) are pending in the Circuit Court of Appeals of the Second Circuit under stipulations to abide the event of the Ogle case.

Rand's estate had a fair market value at death of not less than $2,104,748. Included among the assets were $223,814.73 in cash, and United States Government obligations worth $145,829.60, the two items totalling $369,644.33. During administration and prior to January 28, 1927, the estate had cash receipts of $161,995.97. All the estate's debts and obligations, including those payable after distribution as well as those paid or payable before that time, amounted only to $263,832.29 (R. 15).

On May 28, 1928, petitioner sold his shares for $439,261.05, thereby realizing a taxable profit of $269,841.72.[2] In his income-tax return petitioner reported the gain as capital gain, on the theory that under Section 101 of the Revenue Act of 1928 it was derived from the sale of capital assets. Respondent contends that the profit was ordinary income taxable at normal and surtax rates, and asserted a deficiency accordingly. The Board approved the Commissioner's determination, and its decision was upon appeal affirmed by the Circuit Court of Appeals. The deficiency, if respondent's contention is correct, is $20,736.45. If his contention is not correct, petitioner is entitled to a refund of $13,545.09 (R. 14-15, 17, 33, 48-49).

SPECIFICATIONS OF ERROR.

1. The Circuit Court of Appeals erred in holding that the profit realized by petitioner was ordinary income subject to tax at normal and surtax rates, and in not holding that said profit was capital gain within Section 101 of the Revenue Act of 1928.

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[2] The correct figure would seem to be $269,831.72; the market value of all the shares at distribution, computed at $176 each, would amount to $169,429.33 rather than the $169,419.33 stipulated. However, the profit stated in the text, having been agreed to, may be taken as correct.

2. The Circuit Court of Appeals erred in affirming the decision of the Board of Tax Appeals.

SUMMARY OF ARGUMENT.

It is evident, both as a matter of ordinary reasoning and in the light of the history of the statute, that for purposes of the general definition of capital assets contained in Section 101 (c) (8) of the Revenue Act of 1928 the period of holding of an asset must be deemed as beginning at the time the property is acquired.

That petitioner acquired the shares here in question at the date of intestate's death and had therefore held the same for more than two years before sale, and is therefore entitled to have his gain taxed at the rate applicable to capital gains, is settled by *Brewster vs. Gage*, 280 U. S. 327, where it was determined upon similar facts that personal property acquired by bequest or intestacy is acquired at the date of the decedent's death. *Brewster vs. Gage* is none the less controlling because a different statute was there involved, for that statute turned on the same ultimate fact as does Section 101 (c) (8) of the Revenue Act of 1928, the statute here under consideration; the fact itself remains the same, and the Government has so recognized, both in cases and in rulings, which were recognized by Congress by reenactment of the "Capital Asset" definition in the 1928 Act without material change.

This construction of Section 101 (c) (8) is the only one which can be reconciled with Section 168, which clearly recognizes the vesting of the interest of a beneficiary in an estate at the time of death. It also conforms to the general rules of property recognized in Minnesota and elsewhere.

Helvering vs. New York Trust Company, 292 U. S. 455, is distinguishable and does not require the conclusion that the definition of capital assets in Section 101 (c) (8) is inferentially modified by Section 113 (a) (5) of the same Act, which provides that the basis for gain or loss upon disposition of property acquired by intestacy shall be the fair market value of the property at the time of distribution. The shares in the *Trust Company* case were not within the statutory definition, whereas those here involved are. In the *Trust Company* case, moreover, a following of the definition of capital assets according to its terms would have penalized the taxpayer; in the present matter the exact contrary is true. And, finally, if the definition had been taken literally in *Helvering vs. Trust Company*, the policy of Congress to stimulate profit-taking transactions would have been defeated; adherence to the language of the statute in this case would involve no such result.

Section 113 (a) (5) was not enacted for the purpose of arbitrarily fixing time of distribution as acquisition date. At the time of its enactment there was some doubt as to when in cases of intestacy acquisition takes place, and that question was for that reason deliberately avoided and left at large in Section 113 (a) (5). That section is concerned only with *manner* of acquisition, not at all with time of acquisition.

Had it been the purpose of Congress in all cases to require that basis date be arbitrarily regarded also as date of acquisition for capital-gain purposes, it could easily, and it is reasonable to suppose that it would, have inserted in the law a general provision to that effect. Instead, in subdivisions (A), (B) and (C) of Section 101 (c) (8) it singled out three situations, none of them applicable here, wherein time of acquisition and basis date did not coincide,

and as to such situations specifically provided that the former should be controlled for capital-gain purposes by the latter. This special provision covering the situations thus singled out negatives any intent on the part of Congress that time of acquisition should in all cases be regarded as being the same as the basis date.

Subdivision (B) of Section 101 (c) (8) is not applicable. By its terms it is limited to situations where a taxpayer's basis date is earlier than acquisition date—in other words, where the taxpayer's base is a substituted one. Such a situation is that of a donee of a gift *inter vivos*, and it was to that that the subdivision was directed. Subdivision (B) is confined to situations involving successive tenures. There are no successive tenures here; the taxpayer's tenure, equally with that of the personal representative of the decedent's estate, began at the time of decedent's death. Subdivision (B), moreover, was enacted for the purpose of broadening or liberalizing the capital assets definition. Under the Government's contention the provision is given a contrary effect.

The Commissioner's position violates the rule that statutory language should be given a sensible construction according to its natural import, and results in reading into the law numerous absurdities, discriminations, and injustices, things which should never be attributed to a lawmaker so long as another interpretation is permissible which avoids them.

The Commissioner is arguing for a narrow interpretation of the capital-gain provisions. In doing so he proceeds in complete disregard of *Helvering vs. Bliss*, 293 U. S. 144, wherein this Court definitely laid down the rule that those provisions are to be given a liberal construction in the taxpayer's favor.

ARGUMENT.

The only issue is whether on the date of their sale, May 28, 1928, petitioner's shares of stock were "capital assets," which for Federal income-tax purposes is defined by Section 101 (c) (8) of the Revenue Act of 1928, *infra*, the Act here involved, as meaning "property held by the taxpayer for more than two years." If petitioner had held the shares for that length of time, he was subject to tax on his profit only at the flat rate specified in Section 101 (a), *infra*, whereas if his ownership was for less than two years the ordinary graduated rates were applicable. Petitioner acquired the securities through inheritance from Alonzo T. Rand, who died October 31, 1925. The Board and the court below concluded nevertheless that petitioner had held the shares only since January 28, 1927, because not until then was their formal distribution to him effected. That conclusion, we submit, is plainly erroneous.

I.

THE PERIOD OF HOLDING BEGINS AT THE TIME OF ACQUISITION.

The definition of capital assets made in Section 101 (c) (8) is a concise one. Except in respect of such situations as fall within the provisions of any one of the three subdivisions (A), (B) and (C), the one and exclusive test laid down by the statute is whether the taxpayer has held the property for more than two years. Since none of the subdivisions mentioned is applicable here, as the court below held (R. 43-44) and as we shall point out in some detail later in this brief, the result is that under the language of the statute the inquiry relates primarily and solely to when petitioner's period of holding began.

Quite obviously, where, as here, there is no applicable statutory fiat to the contrary, property must be regarded as held or owned from the time it is acquired. No other view is reasonably possible, for manifestly an owner's period of holding of an asset can begin neither before nor after his acquisition of the property. In any event, it is plain that no other view is contemplated by the statute. The capital-asset provisions were first written into the law as part of the Revenue Act of 1921, c. 136, 42 Stat. 227. Section 206 (a) (6) of that Act corresponds to Section 101 (c) (8) of the 1928 Act. In the former "capital assets" was defined as meaning "property *acquired* and held • • • for more than two years." (Italics supplied.) The use of the word "acquired" in the 1921 definition obviously made that definition neither broader nor narrower than the definition contained in the 1928 Act. The word was plainly surplusage; it was dropped in the 1924 Act (Section 208 (a) (8), R. A. of 1924, c. 234, 43 Stat. 253), and neither the House Committee on Ways and Means nor the Senate Committee on Finance indicated in its report that it thought any change in the law was thereby effected. See House Report No. 179, 68th Congress, 1st Session, pp. 19-20; Senate Report No. 398, 68th Congress, 1st Session, pp. 21-22. As said in *First National Bank vs. United States* (C. C. A. 1st), 76 F. (2d) 200, 202:

> In the 1921 Revenue Act, Section 206 (a) (6), 42 Stat. 232, it was provided that to constitute capital assets, property must be "acquired and held" for two years. In subsequent acts the word "acquired" has been omitted, the obvious reason is that the word "acquired" was surplusage, since, in general, property is held from the time it is acquired or one's ownership begins.

These views are in accord with what this Court has said. In the recent case of *Helvering vs. New York Trust Co.*, 292 U. S. 455, it was pointed out (p. 469) that "capital assets" has the "same definition in the Acts of 1921, 1924 and 1926." Moreover, the Court had just remarked (p. 468) that Section 208 (a) (8) of the Revenue Act of 1926, c. 27, 44 Stat. 9, which is identical, so far as here of interest, with Section 208 (a) (8) of the 1924 Act and Section 101 (c) (8) of the 1928 Act, "contains substantially the same language as that used in the 1921 Act to define capital assets."

It is difficult to understand how the court below could cite this decision as holding that the "language [of Section 101] clearly limits 'held' to the period after distribution," particularly when the majority opinion of this Court in the New York Trust Co. case frankly conceded that "strictly according to the letter" and giving the words their "natural significance" a different result would necessarily be reached.

See also *Lee vs. Commissioner* (C. C. A. 1st), 76 F. (2d) 203, 204. To the same effect is *Shaffer vs. Commissioner*, 28 B. T. A. 1294, wherein the manifestly correct observation was made that "the two-year period * * * begins to run from the date of petitioner's acquisition of the property * * *." See also *Hooper vs. Commissioner*, 26 B. T. A. 758, 760.

The issue obviously resolves itself into a question of determining when petitioner acquired the property which he sold on May 28, 1928.

II.

The Time of Petitioner's Acquisition Was the Date of Decedent's Death.

The question of when property is acquired, under facts similar to those here involved, was definitely determined by this Court in *Brewster vs. Gage,* 280 U. S. 327, and the decisions below are in their effect plainly contrary, we submit, to the pronouncement there made. In that case the issue was whether certain stocks received under a will as the residue of an estate were acquired by the residuary legatee at the date of the testator's death or at the time of their distribution. This Court held that acquisition was at death, and in doing so recounted the rules generally applicable, in Minnesota (*Granger vs. Harriman,* 89 Minn. 303, 304-305, 94 N. W. 869), as elsewhere, to the descent and distribution of personal property. It said (p. 334):

> Upon acceptance of the trust there vests in the administrators or executors, as of the date of death, title to all personal property belonging to the estate; it is taken, not for themselves, but in the right of others for the proper administration of the estate and for distribution of the residue. The decree of distribution confers no new right; it merely identifies the property remaining, evidences right of possession in the heirs or legatees and requires the administrators to deliver it to them. The legal title so given relates back to the date of death. * * *
>
> Petitioner's right later to have his share of the residue vested immediately upon testator's death. At that time petitioner became enriched by its worth which was directly related to and would increase or decline correspondingly with the value of the property. * * *

This Court concluded accordingly that the time of the taxpayer's acquisition of the shares was the date of the testator's death. See also *Security Trust Co. vs. Commissioner* (C. C. A. 6th), 65 F. (2d) 877; *Hopkins vs. Commissioner* (C. C. A. 7th), 69 F. (2d) 11, certiorari denied 293 U. S. 560; *Chandler vs. Field* (C. C. A. 1st), 63 F. (2d) 13; *Conrad vs. Commissioner*, 27 B. T. A. 741; I. T. 1889, III-1 Cumulative Bulletin 70. Cf. *Lane vs. Corwin* (C. C. A. 2d), 63 F. (2d) 767, and *Pringle vs. Commissioner* (C. C. A. 9th), 64 F. (2d) 863.[3]

The legal concept that the interest of a beneficiary vests at the date of testator's death is not confined to cases involving tax matters. It is generally recognized in Minnesota as well as elsewhere as applicable to all questions relating to the inheritance of personal property. In *Granger*

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[3] In reaching the opposite conclusion in the present case the Board relied (R. 16) upon its prior decisions in McFeely vs. Commissioner, 29 B. T. A. 998, and Dibblee vs. Commissioner, 29 B. T. A. 1070, in each of which upon somewhat similar facts the Board in effect held that the property was not acquired until distribution. The reason, the Board said in both instances, was that prior to that time the taxpayer was without possession of specific assets. Cf. Section 168 of the Revenue Act of 1928, infra. But that was the situation in the Brewster case, and if it was true of the taxpayer there that he acquired the property at the date of the decedent's death, it is no less true of the taxpayer here. Ownership and holding began at that time in the one instance as in the other, and no reason has been adduced, and none occurs to us, why what was said and decided in the Brewster case is not as fully true in the one situation as it was in the other. In neither the McFeely nor the Dibblee case did the Board even mention Brewster vs. Gage. Only in the dissenting opinion in the Dibblee case is the Supreme Court's decision referred to. It is there recognized as controlling, however.

It is interesting to observe that no authorities are cited in support of the Board's conclusion in the Dibblee decision, and that in the McFeely case the Board relied only upon Johnson vs. Commissioner (C. C. A. 3rd), 52 F. (2d) 726, and Schoenberg vs. Commissioner (D. C. App.), 55 F. (2d) 543, cases dealing with different situations, both of which have since been overruled by this Court in its recent New York Trust Co. decision, supra, note 3.

The decisions in the McFeely and Dibblee cases have since been affirmed by Circuit Courts of Appeals. In the McFeely case affirmance was without discussion, on the ground that no principle of importance was involved. McFeely vs. Commissioner (C. C. A. 3d), 74 F. (2d) 1017. Affirmance in the Dibblee case was accompanied by an opinion but there again Brewster vs. Gage was not even referred to. Dibblee vs. Commissioner (C. C. A. 9th), 75 F. (2d) 817.

vs. Harriman (supra), the Minnesota Supreme Court recognized that where, as in A. T. Rand's estate, the liquid assets greatly exceed the amount of all debts the heirs as a practical matter know from the time of the decedent's death exactly what property each of them is entitled to and can validly and effectively pay the debts and divide the property, dispensing entirely with the formalities of administration. It was there said at pages 304-305:

> Subject to this right of possession and qualified title [in the personal representatives], the property descends direct to the heirs, and no final decree is necessary where those entitled to the estate agree upon a division of the same. The substantial facts accomplished by the administration are the payment of debts and the distribution of the residue of the property. So that, if there are no debts and a division of the property is amicably made by those entitled to it, nothing remains for an administrator to act upon. Many of the authorities sustain the right of the interested parties in such cases to dispense with an administration, even before the time limited for creditors to appear and present their claims, by paying all debts, or showing that none existed, and distributing the property among those entitled to it. [Citing cases.]

See also *Barnes vs. Verry,* 174 Minn. 173, 177, 218 N. W. 551;

Vail vs. Anderson, 61 Minn. 552, 555, 64 N. W. 47.

It is no answer to *Brewster vs. Gage* to say, as the court below intimated (R. 44), that application of a different statute was there involved. The important thing is that there, as here, the only issue was when as a matter of law and fact the property was acquired, and it is obviously of

no moment that different statutes attach different consequences to the same ultimate fact. It was the Government, not the taxpayer, that argued in *Brewster vs. Gage* that death was the time of acquisition. That position was right, and the Government prevailed. The Government can hardly with consistency now claim, merely because it is the applicability of a different statute which turns upon that same ultimate fact, that some other time is the time of acquisition. If it is to be said for one purpose that a taxpayer has held property from the time of a decedent's death, then the same thing should be said where that same fact is important for other purposes.

That this is so the Government has itself recognized. In the *Security Trust* and *Conrad* cases, *supra*, for example, the Commissioner in each case contended, upon facts legally parallel with those here involved, that under *Brewster vs. Gage* certain shares of stock were acquired by the taxpayer at the date of the decedent's death, and, since that was more than two years before sale was made, he computed the tax upon the resulting profit at the rate applicable to capital gains, whereas if the taxpayer had held the shares only from the date of distribution the profit was taxable at the rates applicable to ordinary income. In both cases the Revenue Act involved was that of 1926, wherein the definition of capital assets, so far as here important, is identical with that in the Revenue Act of 1928.[4]

Even before *Brewster vs. Gage* was decided, moreover, the Income Tax Unit of the Bureau of Internal Revenue

[4] The fact that the profits in Security Trust Co. vs. Commissioner were taxed at the capital-gain rate is shown only by the record in that case. In the Conrad case the rate used is shown in the Board's decision, 27 B. T. A. 741, 743. Since application of the capital-gain rate is optional with the taxpayer (see Sec. 101 (a) of the 1928 Act, infra), no dispute would arise where the Commissioner agrees to its use, and the consequence is that few, if any, of the court decisions refer to what rate of tax is applied.

had formally ruled that for capital-gain purposes the holding period of an heir or legatee runs from the decedent's death. It was so held in I. T. 1889, III-1 Cumulative Bulletin 70, with respect to Section 206 (a) (6) of the 1921 Act, and it will be observed therefrom that the foundation for the Government's conclusion is identical with that upon which this Court rested its decision in *Brewster vs. Gage,* namely, that in point of both law and actuality the distributee is the real owner of the property from the time of the decedent's death. Technical considerations have not in other instances, in matters relating to capital gains and losses, been allowed to work to the detriment of taxpayers by obscuring and defeating obvious facts. *Helvering vs. New York Trust Co., supra,* p. 465 (commenting on stock dividends); *Wood vs. Commissioner* (C. C. A. 1st), 75 F. (2d) 364 (dealing with stock acquired by exercise of rights). See also Section 168 of the Revenue Act of 1928, *infra.* They should not be allowed to do so here, particularly since under *Brewster vs. Gage* petitioner's shares are squarely within the letter of the statutory definition of capital assets.

III.

Reenactment of "Capital Assets" Definition Without Change in 1928 Act Confirms Departmental Rulings of Long Standing Sustaining Petitioner's Contention.

The definition of "capital assets" contained first in the 1921 Act has been reenacted in each subsequent Act without material change, except for the addition in the 1926 Act of what are now Subdivisions (A), (B) and (C) of the Section containing that definition, none of which are applicable to the case at bar.

The Commissioner of Internal Revenue, as early as 1923,

by I. T. 1719, II-2 Cumulative Bulletin 45, and by letter to Prentice-Hall, Inc., published in Prentice-Hall Tax Service for 1923 at pages 2703-4, and again in January, 1924, in I. T. 1889, III-1 Cumulative Bulletin 70, had definitely construed this definition as fixing the date of acquisition and the commencement of the holding period for a residuary legatee or heir as the date of the testator's death. So far as we have been able to ascertain these departmental rulings have never been modified or changed. They had been in effect for many years when the 1928 Act was passed, and in the 1928 Act the same definition of "capital assets" was reenacted. Under these circumstances, Congress must certainly have intended this definition to have the meaning given it by the Department during all of these years. *Helvering vs. Bliss*, 293 U. S. 144.

It is true that in the earlier case of *Helvering vs. New York Trust Co.*, 292 U. S. 455, a divided Court held that the reenactment in the 1924 Act of the definition of "capital assets" was not necessarily an adoption of the Commissioner's construction as set forth in two I. T.'s issued late in 1922 and 1923. The principal reason assigned for this conclusion by the majority opinion was that it did not appear that the attention of Congress had been called to these rulings, and that there was no ground on which to infer that Congress had intended to approve them.

In the *Bliss* case, on the other hand, this Court unanimously held that the reenactment in later Acts of the Sections therein questioned indicated Congressional approval of administrative interpretation contained in three rulings: —A telegraphic ruling by the Commissioner; an I. T. (income tax ruling by the Commissioner); and a Mim. (mimeographed instruction by the Commissioner to collectors).

If there is any inconsistency between the holdings on this

subject in the *Bliss* case and in the *New York Trust Co.* case, the *Bliss* case, being the later one and a unanimous decision of the Court, represents the present and established law.

We submit, however, that the facts in the two cases may be distinguished. In the first place, in the *New York Trust Company* case, the Commissioner was urging that the reenactment confirmed rulings in favor of the Government, whereas in the *Bliss* case, as in the case at bar, the rulings in question had been in favor of the taxpayer, and the Commissioner was, and is here, asking the Court to hold that such rulings were wrong, notwithstanding reenactment of the definition without change. In the second place, the rulings upon which the Commissioner was relying in the *New York Trust Co.* case had been comparatively recent, and the Court, therefore, could not infer that they had come to the attention of Congress, whereas in the *Bliss* case and in the present case the rulings relied upon have been in effect and unchanged for many years.

The Court might well, as it did in the *New York Trust Co.* case, hesitate to penalize a taxpayer on the ground that Congress had adopted a departmental ruling in favor of the Government by an Act passed shortly after the ruling. It would, however, be quite a different thing to penalize a taxpayer by refusing to recognize that Congress had adopted administrative rulings of long standing in favor of the taxpayer by reenactment of the "capital assets" definition in the 1928 Act.

IV.

Helvering vs. New York Trust Co., 292 U. S. 455, Does Not Require the Conclusion That Section 101 (c) (8) Is Inferentially Modified by Section 113 (a) (5).

While the court below conceded (R. 43, 48), as is obviously the case, that petitioner's holding period, under the language of Section 101, might begin at the date of decedent's death, it held nevertheless that the taxpayer should be penalized and deprived of the optional rate of tax thus plainly given him by the terms of that statute, on the ground (R. 44, *et seq.*) that the decision of this Court in *Helvering vs. New York Trust Co.*, 292 U. S. 455, compels the conclusion that Section 113 (a) (5) of the Revenue Act of 1928, *infra*, because it changed the basis for determining gain or loss upon the sale of personal property acquired by intestacy must be construed as changing the meaning of Section 101 which was reenacted without amendment in such a way as to prevent the latter statute from being applied as it had theretofore and according to the ordinary import of its language, and that in consequence petitioner must be regarded as having held the shares only from the time fixed by Section 113 (a) (5) as amended as the basis date. We submit that *Helvering vs. New York Trust Co.* requires no such holding, and that the view of the court below operates unjustifiably to broaden and extend what this Court there decided, and to do so in respect of a situation quite different as to both facts and principle involved.

The question at issue in the *New York Trust Co.* case was whether under the Revenue Act of 1921 securities received by gift in 1921 and sold in 1922 should be regarded as having been held for more than two years, in view of a statutory requirement that for purposes of determining gain or

loss upon a sale or disposition of the securities the basis to the donee should be the same as the property would have had in the hands of the donor, and the donor had acquired the property before March 1, 1913. This question this Court answered in the affirmative.[5]

Discussion of the issue was prefaced by the Court's admission (p. 463) that, contrary to what is true at bar, "if the words [of the capital-asset definition] alone are to be looked to, the shares were not by the taxpayer 'held * * * for more than two years.'" That should not be deemed conclusive, however, the Court said (p. 464), for "the expounding of a statutory provision strictly according to the letter without regard to other parts of the Act and legislative history would often defeat the object intended to be accomplished," and the first obligation of a court in a matter of statutory construction, established by numerous quoted authorities, is to give effect to the law-makers' intent. Attention was then called (p. 466) to the purpose Congress had in mind in the enactment of the capital-gain provisions, which, as expressed in House Report No. 350, 67th Congress, 1st Session, pp. 10-11, was to "stimulate profit-taking transactions" by making optional a flat rate of tax, and in respect of that purpose this Court said (p. 466) that "there is no distinction between gains derived from a sale made by an owner who has held the property for more than two years and those resulting from one by a donee whose tenure plus that of the donor exceeds that period." That being true, this Court concluded (p. 467), it must be assumed that when Congress provided that a donee should be put into his donor's shoes for the purpose of getting a base, the

[5] It should be pointed out that three justices, Mr. Justice Roberts, Mr. Justice Brandeis, and Mr. Justice Stone, did not concur, on the ground that the definition of capital assets should be read and applied as written.

"continuity required" for that purpose "was also intended for use in finding the rate," that is, the holding period, and that therefore the two statutory provisions should be looked upon as "applicable respectively to different elements of the same or like transactions" and not "be regarded as wholly unrelated." It is obvious that only by taking that position could the Court make the legislative intent effective, and if the donee was to be put into the donor's shoes for the one purpose it was only right and just that he should be put there for the other; "it is to be inferred that Congress did not intend penalization" (p. 467). The result so reached was written directly into the statute in the Revenue Act of 1926 as part of Section 208 (a) (8). It has been retained in each succeeding law and appears as Section 101 (c) (8) (B) of the Revenue Act of 1928, *infra*.

Apparently forgetful of the rule that "always the language used in an opinion must be read in the light of the issues presented" (*Sinclair vs. United States*, 279 U. S. 749, 767; *Thorsen vs. Commissioner* (C. C. A. 9th), 65 F. (2d) 234, 236, affirmed, *Thorsen vs. Helvering*, 291 U. S. 163), the court below (R. 44) seized upon the words in *Helvering vs. New York Trust Co.* to the effect that the capital-asset definition and the basis provisions there involved were not to be regarded as wholly unrelated, and proceeded to deduce therefrom (R. 45, *et seq.*) that in any situation where, as here, basis date is different from acquisition date, the latter must unalterably be regarded as being the same as the former. We submit that this Court laid down no such sweeping and arbitrary rule, that the problem before the Court in the *New York Trust* case was in many respects quite different from that here presented, that the court below made an unsound application of the principles there found controlling, and that the conclusion reached in that case should be read

strictly in the light of and be limited to the facts there involved.

First. It is to be observed that in the *New York Trust* case this Court was admittedly dealing with a situation where the property in question was *not* within the letter of the capital-asset definition, whereas here the exact contrary is the case; here the shares were acquired more than two years before sale, while there they were acquired less than two years before sale. Thus whereas in the *New York Trust* case the issue was whether the taxpayer should be relieved from penalty by treating the shares as though they were within the definition in spite of the fact that they were not, the issue in the present matter is whether the taxpayer should be *subjected* to penalty by treating the shares as though they are not within the definition in spite of the fact that they are. In the *New York Trust* case this Court broadened the statute in order to confer on the taxpayer a benefit. The court below in the present controversy interprets that decision as authority for the proposition that the same statute may be narrowed in order to deprive a taxpayer of the same benefit. Obviously the situations in the two cases are not parallel. Obvious also is the fact that the rule applied by the court below is not the same rule as that applied by this Court. And equally obvious is a lack of harmony in result; in the one situation penalty was avoided; in the other it is imposed. Yet in *Helvering vs. New York Trust Co.* this Court said (p. 468) that it is to be inferred that Congress did not intend penalization.

The penalization of the taxpayer in the present situation becomes more apparent when we consider the fact that the sale of the shares involved here was actually made before the 1928 Act was enacted and in reliance on uniform administrative rulings which amply justified the taxpayer's

assumption that the shares had been held for more than two years.

Second. We submit further that, with respect to its relation to the purpose of Congress in enacting the capital-gain provisions, the situation at bar is unlike that in the *New York Trust* case. This Court there (p. 464) reaffirmed as sound the rule that a statute should be given effect according to its language, and that even hardship, if the sole consideration, is not sufficient to warrant a departure.[6] The exception, it was further made clear (p. 464), is limited to cases where "the expounding of a statutory provision strictly according to the letter" would "defeat the object intended to be accomplished"; if the words of a statute literally interpreted bring about a result at variance with the design and purpose of the enactment, it may be proper to sacrifice the language as written.

The legislative policy behind the enactment of the capital-asset definition, as set out in the *New York Trust Co.* opinion, was to "stimulate profit-taking transactions," and "to lessen hindrance caused by high normal and surtaxes." If it had not been held in that case that the shares there in question were capital assets, the obvious result would have been that the policy behind the statute would have been defeated. The court below in the present matter seems to have thought that the same result would follow if petitioner's shares were allowed to remain in the category of capital assets where the literal language of the law places them. That view is plainly not correct. We may assume as true, what the court below reiterates (R. 46, 48), that Congress had specifically in mind, in enacting the statute permitting the optional rate

[6] By departing from the language of the statute in the case at bar, the court below, as already noted, not only does not avoid hardship, but instead creates it.

on capital gains, gains accumulated over more than two years, whereas here the gains were accumulated over a shorter period. That consideration is not decisive, however. The fact is that the use of the optional rate in the present matter is entirely consistent with and even in furtherance of the fundamental policy of Congress of stimulating profit-taking;[7] the Government's contention in *Helvering vs. Trust Co.* would have operated actively to thwart and defeat this fundamental policy. The difference is a real one. The only justification for departing from the letter of the law, as the *New York Trust* decision expressly recognizes, is where otherwise the purpose of the legislature is defeated. We know of no authority, and neither the court below nor the Government has pointed to one, which holds that anything short of that is sufficient to permit disregard of otherwise clear language. The *New York Trust Co.* decision is not authority for the proposition that the clear language of a statute may be overridden when to do so serves or advances no established or plainly-declared legislative policy. It is one thing to depart from the words of a statute in order to permit it to accomplish its purpose; it is another and wholly different thing to depart from it where no policy is thereby advanced.

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[7] Application of the capital rate would in many instances, under facts similar to those in issue, affirmatively promote the legislative policy by stimulating profit-taking. While it is true that under Section 113 (a) (5), infra, only the accumulation in gain from the time of distribution is taxed, that accumulation, as pointed out in Brewster vs. Gage, p. 335, may in fact be greater than the accumulation from the time of the decedent's death, in which case it is evident that failure to apply the capital-gain rate would "freeze" the assets (New York Trust Co. vs. Commissioner (C. C. A. 2d), 68 F. (2d) 19, 20) at least as much as though the accumulation from the time of death were taxed. The Dibblee case, supra, is an example. There the value at death was greater than the value at distribution. 75 F. (2d) 618.

V.

The 1928 Amendment to the Basis Section Was Not Intended to and Did Not Change the "Capital Assets" Definition.

The decision below in effect holds, as it seems do also *Ogle vs. Helvering, supra; Dibblee vs. Commissioner, supra,* and the decision of the District Court in *First National Bank vs. United States,* 7 F. Supp. 915 (reversed *First National Bank vs. United States* (C. C. A. 1st), *supra*), that Section 113 (a) (5) was enacted for the purpose of fixing not only basis date but acquisition date. We submit that this is plainly not so, and that the contrary view violates the express language of that Section and is the result of a failure properly to recognize the occasion and purpose of the enactment.

In all Acts prior to the 1928 Act, the basis date in the case of inherited property was fixed as "time of acquisition." While Section 113 (a) (5) of the 1928 Act changed the basis date as to general legatees, there is nothing in the Act or in the Committee reports regarding the same to indicate any intention to declare that the new basis date should be regarded as the acquisition date. On the contrary, the language used in the new Section clearly indicates a recognition that the new basis date is a date other than the date of acquisition. This appears from the use of the phrase "time of distribution to the taxpayer" in the same sentence and in connection with the phrase "acquired either by will or by intestacy." When the use of these phrases in juxtaposition is considered in the light of the use in prior Acts of the phrase "time of acquisition," it becomes apparent that Congress purposely used the phrase "time of distribution" not as a synonym for but in contradistinction to the phrase

"time of acquisition." Had Congress intended to define "time of acquisition" for the purpose of such a case as this, it could easily have done so. In fact it is inconceivable, in view of the uniform administrative practice in treating a legatee as having "acquired and held" property from the date of death, that Congress would not have so defined "time of acquisition" had it intended to do so. The effect of the plain language of Section 113 (a) (5) is recognized by the Circuit Court of Appeals for the First Circuit in the *First National Bank* case, *supra*, as follows:

> It is significant, however, that even in paragraph (a) (5) of section 113 of the 1928 Revenue Act, notwithstanding the arbitrary fixing of the base value as of the date of distribution in case of a residuary bequest, it is recognized that personal property transmitted at death is acquired either by will or by descent. It expressly provides that "If personal property was acquired by specific bequest," etc., and "in all other cases if the property was *acquired either by will or by intestacy.*" (Italics supplied.)

Section 113 (a) (5) is in no way concerned with fixing the time of acquisition of property acquired by bequest or inheritance. It is concerned solely with the *manner* of its acquisition, and then only for the purpose of prescribing what dates should be used in determining basis for computing gain or loss upon subsequent disposition. The fact was that Congress in enacting Section 113 (a) (5) was purposely avoiding and leaving at large the question of time of acquisition, and it was doing so because that question in 1928 had not been passed on by this Court. In the revenue acts prior to that of 1928 the basis for determining gain or loss on property acquired by bequest or inheritance was prescribed as its market value at "the time of such acquisition."

Section 202 (a) (3) of the Revenue Act of 1921; Section 204 (a) (5) of the Revenue Acts of 1924 and 1926. What that time is was first considered by this Court in *Brewster vs. Gage,* but that case had not been decided when the Revenue Act of 1928 was under consideration, and to eliminate the resulting uncertainty Congress determined, in prescribing basis, to proceed without regard to when such property is in fact acquired and to prescribe basis without reference thereto. Section 113 (a) (5) was the result. See Senate Report No. 960, 70th Congress, 1st Session, p. 26. The provisions of that statute were continued as Section 113 (a) (5) of the Revenue Act of 1932, c. 509, 47 Stat. 169. In 1934, however, Congress reverted to the language of the 1926 and preceding Acts (see Section 113 (a) (5) of the Revenue Act of 1934, c. 277, 48 Stat. 683), and in respect thereof the Committees on Ways and Means and on Finance stated (House Report No. 704, 73rd Congress, 2d Session, p. 28; Senate Report No. 558, 73rd Congress, 2d Session, p. 35):

> Section 113 (a) (5) of the Revenue Act of 1932 is a re-enactment of a similar provision contained in the 1928 act. The change in the 1928 act was made because there was some doubt as to meaning of the term "date of acquisition," which was the term used under the Revenue Act of 1926. Since the 1928 act was passed, the Supreme Court has defined "the date of acquisition" to mean the date of death in the case of all property passing by bequest, devise, and inheritance, whether real or personal. (*Brewster vs. Gage,* 280 U. S. 327). Section 113 (a) (5) of the bill conforms to the language contained in the Revenue Act of 1926, so that a uniform basis rule may be required in the case of property passing at death, whether real or personal.

It is apparent, as Congress itself stated, that Section 113 (a)-(5) of the Revenue Act of 1928 has nothing whatever to do with the question of when property such as that here involved is in fact acquired. See *Beers vs. Commissioner*, 31 B. T. A. 117, 119-120, affirmed (C. C. A. 3d), 78 F. (2d) 447. The decisions referred to above overlook that circumstance, however, and the result is that in those cases the courts have taken a statute whose interpretation is not even in issue and which in no way solves or is directed to the problem of when inherited property is acquired, and have used it as an instrument in forcing out of another statute a construction which deprives the words of the latter, contrary to established principle (*Old Colony R. Co. vs. Commissioner*, 284 U. S. 552, 560), of their natural and popular import, and which in addition causes that other statute, again in opposition to settled rule (*Shaw vs. Merchants' National Bank*, 101 U. S. 557), to run counter to and in disregard of the actual common-law fact, which is that property acquired by bequest or inheritance is acquired at the time of decedent's death, and not at some later time.

A reading of these decisions unmistakably indicates that they are the result of the misconception of the scope of the majority decision in the *New York Trust Co.* case, which we have analyzed above. The Circuit Court of Appeals of the First Circuit, however, recognized that in holding that Sections 101 and 113 were not "wholly unrelated," this Court did not in the *New York Trust Co.* case hold that basis date and date of commencement of holding must necessarily in all cases be the same.[8] Hence, that Court found nothing in the *New York Trust Co.* case which modifies the ruling of *Brew-*

[8] The majority opinion in the New York Trust Co. case expressly concedes that the use of a basis date differing from the date of commencement of holding is "undoubtedly legally possible and within the power of Congress."

ster vs. Gage and nothing that is inconsistent with its language, found at pages 202-203:

> Section 101 and section 113 were enacted for entirely different purposes. The first defines capital assets and capital gains; the second defines the method of determining the amount of gains, whether capital gains or income. They are not interdependent in the sense that the date from which gains and losses are computed must in all cases be the same as when the property was acquired by the taxpayer.
>
> In other words, Congress intended only by the change in section 113 (a) (5) of the 1928 Revenue Act to make clear the base value for determining gains and losses in case of property transmitted at death, because of some uncertainty which had arisen in the Administrative Bureau as to date of acquisition of such property. It, however, made no substantial change in section 101 of that act from the provisions of section 208 (a) (8) of the 1926 Revenue Act for determining what are capital assets.
>
> In view of the purpose, which has repeatedly been recognized both by the Administrative Bureau and the courts, of allowing a gain from the sale of property held for more than two years to be taxed as a capital gain, we do not think a narrow construction should be given to any provision in the Revenue Acts that would tend to defeat such purpose, unless it clearly follows from the language used. It should not be done by implication as here contended by the government in construing section 113 (a) (5) of the 1928 Revenue Act. It cannot be said to be a necessary implication that when Congress, in order to clarify some uncertainty as to the date of acquisition of residuary bequests, fixed the base date for com-

puting gains in case of the sale of personal property so acquired as the date of distribution, it also intended thereby to limit the period during which such property was held. It is inconceivable, we think, that if Congress intended by section 113 (a) (5) of the Revenue Act of 1928 to effect a change in the period during which property acquired by will or inheritance must be held to constitute capital assets, it would not also have made an equally definite change in section 101 of that act.

The correctness of this position, even aside from all other considerations, is conclusively demonstrated when Section 101 (c) (8) is viewed in its entirety. The provision begins with the simple statement that "capital assets" means property held for more than two years. This statement, standing alone, obviously leaves for determination, according to the facts in each case, the question of when acquisition of the property involved occurred. Added to the statement, however, are three qualifying subdivisions—(A), (B), and (C). By these subdivisions, none of which is applicable here, it is provided in effect that in certain specified circumstances holding shall be deemed to have begun, not when the property was acquired, but at some other date, the date in each instance being the basis date.

The manifest effect of the decision below is to add to the three qualifying subdivisions a fourth covering the situation here in issue. The only justification advanced is that otherwise basis date and acquisition date would not coincide. The assumption is that Congress must have intended that they should be coincident.

The infirmity of the argument is that the assumption is without warrant. The fact is that by adding only three subdivisions Congress unequivocally indicated that, except as

therein expressly qualified, Congress did not intend that the commencement of the period of holding should be coincident with the basis date where the latter is fixed at a date other than the date of acquisition. The only reasonable and logical assumption is that if Congress had intended that in all cases these dates should be coincident it could easily and would have said so, instead of singling out the specific situations covered by the three subdivisions.

VI.

Subdivision (B) of Section 101 (c) (8) Is Not Applicable.

The Government argued below (R. 43; Br. 13-14) that petitioner's holding period is controlled by the provisions of subdivision (B) of Section 101 (c) (8), and that under these provisions petitioner's shares may not be treated as having been acquired at a date earlier than their basis date. The court overruled this manifestly erroneous contention. (R. 43-44.) However, the Second Circuit in the *Ogle* case and the *District Court* in the *First National Bank* case proceeded upon the assumption that subdivision (B) was applicable. For that reason we deal with the argument.

Subdivision (B) was neither designed to have nor has anything whatever to do with situations of the kind here in issue. The provision has application only to situations where a taxpayer has as his basis for determining gain or loss the basis of a prior owner, with the result that the taxpayer's basis date is earlier than his date of acquisition; in other words, it has to do with situations where the taxpayer's basis is a substituted one. Such a situation is that of a donee of a gift *inter vivos* consummated after December 31, 1920, which was what was involved in *Helvering vs. New York Trust Co.*, and it was to the position of such a donee, and to

that alone, that Section 101 (c) (8) (B) was intended to apply. Section 101 (c) (8) (B) was first enacted as part of Section 208 (a) (8) of the Revenue Act of 1926, and at that same time Congress made similar provisions, in the same subdivision, in respect of property acquired upon non-taxable corporate reorganizations; the latter provisions appear in the 1928 Act as Section 101 (c) (8) (A) and (C), *infra*. At the time of reporting the Revenue Bill of 1926 the Committee on Ways and Means stated (House Report No. 1, 69th Congress, 1st Session, pp. 6-7):

> The 12½ per cent capital gain and loss provisions apply only to the sale or exchange of capital assets which have been held by the taxpayer for two years. Under the reorganization provisions many transactions are exempt from tax until the stockholder disposes of his stock received as a result of the reorganization. As a result of this fact the question frequently arises as to whether the period that the taxpayer held the stock which he exchanged for new stock should be added to the period for which he held his new stock, in order to determine whether or not he has held it for two years. The amendment proposed to this section incorporates in the law the present regulation of the Treasury and provides that these two periods shall be added for the purpose of determining the period during which the property sold was held for the purpose of determining both gains and loss under this section. The same question arises in the case of property received by gift after December 31, 1920. The amendment provides that the period in which the property was held by the donor shall be added to the period in which the property was held by the donee in determining whether or not the property so received falls within the capital gain or loss section.

See also Senate Report No. 52, 69th Congress, 1st Session, p. 18. Obviously subdivision (B) has no more application here than have subdivisions (A) and (C), and the latter could be resorted to to reach a conclusion against the taxpayer with as much justification as can the former. In adding all three subdivisions to the section, Congress was dealing with situations where acquisition was later than the time of the controlling basis, and its purpose was to treat a taxpayer as though he had held from the earlier date in spite of the fact that he had held only from the later, and this because his basis was a substituted one. Congress was making provision for *adding* tenures; the District Court in the *First National Bank* case and the Second Circuit in the *Ogle* case proceed as though Congress was providing for *subtracting* or *dividing* tenures. There is not the slightest foundation, either in the words of the statute or in the reports of the committees or elsewhere, to support the latter view. As said by the court below (R. 44):

> * * * there is no place in [a situation like that at bar] * * * to employ a substituted extension to carry the "acquisition" of legal interest back to death. We think neither paragraph (B) nor any inference from it is of any aid here.

Aside from the fact that a case like the instant one does not involve successive ownerships, since the distributee's ownership, as decided by *Brewster vs. Gage*,[9] is continuous from the time of the decedent's death, and subdivision (B) is therefore not applicable, it does not follow, as the Com-

[9] The decision of the Circuit Court of Appeals of the Second Circuit in the Ogle case is directly contrary to this decision in refusing to recognize the possibility of simultaneous "holding" by the administrator and the next of kin. Such dual "holding" is a necessary concept under every Revenue Act, and is fundamental in the application of Section 168 of the 1928 Act.

missioner argued below (Br. 14), that because Congress intended that where successive ownerships exist they should be added, it also intended the converse, any more than it follows, because Congress taxes capital gains, that it therefore permits the deduction of capital losses, which is not the case. Section 117 (d) of the Revenue Act of 1934, c. 277, 48 Stat. 683. Instances could be multiplied of logical inconsistencies in the incidence of income taxes. But even if the assumption were logical, which is not true, it would nevertheless be untenable in the light of the historical development of the capital-gain provisions, and even in a tax case "logic must yield to history." *New York Trust Co. vs. Eisner*, 256 U. S. 345, 349; *Schuette vs. Bowers* (C. C. A. 2d), 40 F. (2d) 208, 213. The fact is that ever since the capital-gain provisions were first enacted there has been a steady widening of the concept of capital assets for the purpose of income taxation. In the 1921 Act the definition was limited to property held for profit or investment. Section 206 (a) (6) of the Revenue Act of 1921. In the revision of 1924 that restriction was removed and the definition made to apply to all kinds of property except stock in trade. Section 208 (a) (8) of the Revenue Act of 1924; Senate Report No. 398, 68th Congress, 1st Session, pp. 21-22. And in the Revenue Act of 1926, as we have already seen, the definition was further broadened so as to permit taxpayers to compute their holding periods by adding preceding tenures where the property was acquired by gift or in a non-taxable exchange. Thus the historical situation in 1928 was that every time Congress had changed the scope of the capital-asset definition the result was an enlargement. Under those circumstances "there is little likelihood that the law-makers meant to narrow the concept" (cf. *Burnet vs. Guggenheim*, 288 U. S. 280, 286-287), and that is particularly true here in view of the fact that

the provision which the Government argues was intended to restrict the concept was enacted at the very time Congress was engaged solely in broadening it. The Commissioner proceeds by assumption to convert an intention to enlarge into an intention to restrict, and, in addition, to do so in the face of a settled policy of enlargement. To that seems applicable what was said in *United States vs. Jefferson Elec. Mfg. Co.*, 291 U. S. 386, 396:

> As a general rule where the legislation dealing with a particular subject consists of a system of related general provisions indicative of a settled policy, new enactments of a fragmentary nature on that subject are to be taken as intended to fit into the existing system and to be carried into effect conformably to it, excepting as a different purpose is plainly shown.

Here no different purpose is shown, either plainly or obscurely.

VII.

The Decision Below Makes for Inequality, Absurdity, and Discrimination.

It has long been established that in construing statutes interpretations are to be avoided which lead to absurdities, discriminations, and injustices. *Zellerbach Co. vs. Helvering*, 293 U. S. 172, 178. Yet that is what the Government's position does. Illustrations may be given.

No one has suggested, not even the Commissioner or the courts which have adopted his contentions, that Section 113 (a) (5) was at any time consciously designed by Congress to serve as a definition of capital assets or even as a part of such a definition. So far as here important, the only deliberate definition of capital-assets is that made in Section

101 (c) (8), together with the qualification thereof made in subdivision (B), assuming for the moment, contrary to the fact, that the latter is here applicable. This being true, the circumstance must not be lost sight of that Section 101 (c) (8) and subdivision (B) were not new in the 1928 Act. The former was enacted first in 1921, and the latter in 1926. Each of them, moreover, has been reenacted in each subsequent act in substantially identical language. In view of these considerations it would seem to follow, as a matter of ordinary and sensible construction, that what Congress was saying in one act it was also saying in the others, and that if its words would not fit a set of facts in one instance they would not fit that same set of facts in the others. Certainly "nothing but the * * * ingenuity * * * of an acute and powerful intellect would discover" a hidden meaning in one statement of words and not in another statement of the same identical words, and the law does not favor a construction requiring that degree of mental exertion. *Old Colony R. Co., supra*, 284 U. S. 552, 560. Yet that is what the Government is here contending; it is in effect saying that so far as facts like those here in issue are concerned, the language of Section 101 (c) (8) and of subdivision (B) means one thing *in the 1928 and 1932 Acts, and another thing* in the 1926 and 1934 Acts, in spite of the fact that in all the years the language of these provisions is in all substantial respects identical.

The absurdity is even more striking when the facts in this case are considered. If petitioner had sold his shares on November 1, 1927, it would not be doubted (the 1926 Act being then effective) that they would have constituted "property held by the taxpayer for more than two years." It so happened, however, that petitioner continued to hold the shares and did not dispose of them until May 28, 1928. The

result of that circumstance, the Government asks this Court to say, is that then petitioner held the property for less than two years—that, though he held them longer, his period of holding was shorter, and this in spite of the fact that the Revenue Act of 1928 did not change a syllable in the capital-asset definition as they were written in the 1926 Act.

Or suppose that distribution of the decedent's estate had been delayed until June 1, 1928, and that the sale of May 28, 1928, had been effected by the administrator. The gain, if distributed and taxable to petitioner, would have been taxable to him under Section 162 (b) at the rate applicable to capital gains. Section 168 of the Revenue Act of 1928. However, if distribution had been made a week earlier and petitioner, as in fact occurred, had himself sold the shares, the profit in that situation, the Government argues, should be taxed to petitioner as ordinary income.

If, as we have many times been admonished, we are to look upon and deal with taxation as would practical men, instead of hamstringing substantial facts by the use of technical refinements, the foregoing illustrations make obvious the fact that the Government's position is as unjustifiable from the point of view of substance as it is contrary to the language of the statutes. The inquiry is and should be directed to the question of when as a matter of substance and reality ownership and enrichment became the taxpayer's, not that of when, for purposes foreign to taxation, there might have been change in technical appearance. Petitioner in this case became enriched, not on January 28, 1927, when the probate court, as part of its duty in administering the estate, formally declared what everybody already knew, but on October 31, 1925, when A. T. Rand by his death gave what he owned to his heirs. It was then, if ever, that petitioner succeeded to ownership of the shares. He acquired them

then, and in consequence it was from that date that he held them. *Brewster vs. Gage, supra;* I. T. 1889, *supra.*

VIII.

The Decision Below Contravenes Established Principles of Construction.

In final analysis, all other matters aside, the most favorable view that can be taken of the Government's position is that it is an effort by construction to fill what it assumes to be an omission inadvertently left in the statute. There is no evidence justifying the assumption. But even if the contrary were true it would avail the Government nothing; for nowhere is there anything to indicate, either in the Congressional reports or elsewhere, that Congress, had its attention been directed to the omission assumed by the Government, would have filled it in the manner the Commissioner contends, and in that circumstance it is the duty of the courts to accept and apply the law as the law-maker has left it. It is not allowable to speculate what Congress might have done had it addressed itself to making specific provision for a case of this kind. In this respect what this Court said in *United States vs. Goldenberg,* 168 U. S. 95, 102-103; is applicable:

> The primary and general rule of statutory construction is that the intent of the law-maker is to be found in the language that he has used. He is presumed to know the meaning of words and the rules of grammar. The courts have no function of legislation, and simply seek to ascertain the will of the legislator. It is true there are cases in which the letter of the statute is not deemed controlling, but the cases are few and exceptional, and only arise when there are cogent reasons

> for believing that the letter does not fully and accurately disclose the intent. No mere omission, no mere failure to provide for contingencies, which it may seem wise to have specifically provided for, justify any judicial addition to the language of the statute. In the case at bar the omission to make specific provision for the time of payment does not offend the moral sense (*Holy Trinity Church vs. U. S.*, 143 U. S. 457); it involves no injustice, oppression, or absurdity (*U. S. vs. Kirby*, 74 U. S. 7 Wall. 482; *McKee vs. U. S.*, 164 U. S. 287); there is no overwhelming necessity for applying in the one clause the same limitation of time which is provided in the other. * * * Certainly there is nothing which imperatively requires the court to supply an omission in the statute, or to hold that Congress must have intended to do that which it has failed to do. * * *

The rule is more briefly stated in *Hobbs vs. McLean*, 117 U. S. 567, where this Court said:

> When a provision is left out of a statute, either by design or mistake of the Legislature, the courts have no power to supply it. To do so would be to legislate and not to construe.

See also *Ebert vs. Poston*, 266 U. S. 548, 554.

That Congress in the 1928 Act intended to restrict the definition of capital assets, there is not even a probability; on the contrary, as noted above, the evidence is that the policy of Congress was to enlarge that definition. But even if there were warrant for assuming an intention to make a change, Congress either forgot or failed to make that intention effective, and the law is established that what Congress has left undone no one else may do for it. See *Hopkins vs. Commissioner, supra*, p. 13.

A final consideration is that this is a case wherein doubt, if any there be, must be resolved in favor of the taxpayer.[10] "The reduction of the rate of tax on capital gains," this Court declared in *Helvering vs. Bliss*, 293 U. S. 144, 151, was a liberalization of the law "in the taxpayer's favor," was "begotten from motives of public policy," and is "not to be narrowly construed." That declaration, were there room for doubt, should turn the issue in petitioner's favor.

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[10] The Commissioner argued below (Br. 26) that "it is a matter of conjecture whether the operation of the statute as the Board construed it will operate generally to the advantage of the taxpayer or the Government. Market variations might in one case favor the taxpayer and in another favor the Government, irrespective of whether the time of distribution fixes the basis or not." This contention loses sight of the fact that use of the capital rate is optional with the taxpayer, and that he may be relied on to invoke it when it is to his advantage to do so.

The Second Circuit in New York Trust Co. vs. Helvering, 68 F. (2d) 19, made the statement (p. 20) that "it must be owned that [the capital-gain statute] * * * is a statute of exemption," and reiterated this thought in the Ogle case. We find it difficult to share this view. Some people, and governments too, think that capital gains should not be taxed at all; certainly they would not consider Section 101 a statute of exemption. It must be remembered also that capital gains represent only one side of the ledger; on the other are capital losses, which are subject to rigid limitations in respect of deductibility. The mere fact of a flat rate on capital gains obviously does not make the statute one of exemption; until the recent Revenue Act of 1935 corporate gains have always been taxed at a flat rate, in many years at the same rate as capital gains. See, for example, Section 208 (b) and Section 230 of the Revenue Act of 1926.

In any event, it seems that the question of construction is set at rest by the decision in Helvering vs. Bliss, supra.

CONCLUSION.

We are concerned with a situation squarely within concise statutory language. Disregard of that language on the one hand advances no legislative policy, and on the other penalizes the taxpayer. The language was designed to benefit the taxpayer, and for that purpose, this Court has said, should be liberally construed.

We submit that the decision below should be reversed.

Respectfully submitted,

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APPENDIX.

STATUTES INVOLVED.

Revenue Act of 1928, c. 852, 45 Stat. 791:

Section 101 (a):

In the case of any taxpayer, other than a corporation, who for any taxable year derives a capital net gain (as hereinafter defined in this section), there shall, at the election of the taxpayer, be levied, collected, and paid, in lieu of all other taxes imposed by this title, a tax determined as follows: a partial tax shall first be computed upon the basis of the ordinary net income at the rates and in the manner as if this section had not been enacted and the total tax shall be this amount plus 12½ per centum of the capital net gain.

Section 101 (a) (c) (8) (A) (B) and (C):

For the purposes of this title—

* * * * * * * * *

"Capital assets" means property held by the taxpayer for more than two years (whether or not connected with his trade or business), but does not include stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale in the course of his trade or business. For the purposes of this definition—

(A) In determining the period for which the taxpayer has held property received on an exchange there shall be included the period for which he held the property exchanged, if under the provisions of section 113, the property received has, for the pur-

pose of determining gain or loss from a sale or exchange, the same basis in whole or in part in his hands as the property exchanged.

(B) In determining the period for which the taxpayer has held property however acquired there shall be included the period for which such property was held by any other person, if under the provisions of section 113, such property has, for the purpose of determining gain or loss from a sale or exchange, the same basis in whole or in part in his hands as it would have in the hands of such other person.

(C) In determining the period for which the taxpayer has held stock or securities received upon a distribution where no gain is recognized to the distributee under the provisions of section 112 (g) of this title or under the provisions of section 203 (c) of the Revenue Act of 1924 or 1926, there shall be included the period for which he held the stock or securities in the distributing corporation prior to the receipt of the stock or securities upon such distribution.

Section 168:

In the case of an estate or trust, or of a beneficiary of an estate or trust, the proper part of each share of the net income which consists, respectively, of ordinary net income, capital net gain, or capital net loss, shall be determined under rules and regulations to be prescribed by the Commissioner with the approval of the Secretary, and shall be separately shown in the return of the estate or trust, and shall be taxed to the beneficiary or to the estate or trust as provided in this Supplement, but

at the rates and in the manner provided in section 101 (a) and (b), relating to capital net gains and losses.

Section 113 (a) (5):

The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the cost of such property; except that—

* * * * * * * * *

(5) If personal property was acquired by specific bequest, or if real property was acquired by general or specific devise or by intestacy, the basis shall be the fair market value of the property at the time of the death of the decedent. If the property was acquired by the decedent's estate from the decedent, the basis in the hands of the estate shall be the fair market value of the property at the time of the death of the decedent. In all other cases if the property was acquired either by will or by intestacy, the basis shall be the fair market value of the property at the time of the distribution to the taxpayer. * * *